

RULE 60. RELIEF FROM JUDGMENT OR ORDER

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Text of Rule 60

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate

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court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948;¹ Dec. 29, 1948, eff. Oct. 20, 1949.²

1. 1948 amendment

Rule 60 was rewritten with more particularity and specification. The rule before amendment was as follows:

"(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

"(b) **Mistake; Inadvertence; Surprise; Excusable Neglect.** On motion the court, upon such terms as are just, may relieve a party or his legal representative from a

judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Ju-

2. See note 2 on page 140.

discretion under this rule to refuse to reopen if the statutory conditions are satisfied.³⁹

The rule makes no reference to the Soldiers' and Sailors' Civil Relief Act of 1940,⁴⁰ but the Advisory Committee Note to the 1948 amendments recognized its existence⁴¹ and relief is available in appropriate cases under the provisions of that statute.⁴²

The statutes permit two procedures to set aside a judgment of naturalization. A plenary action may be brought in accordance with the procedures set out by statute⁴³ or relief may be sought by motion under Rule 60(b).⁴⁴ It has been said that the plenary action normally is to be preferred.⁴⁵ The judgment may not be attacked by an independent action save as specified in the statute authorizing a plenary action.⁴⁶

§ 2870. Fraud on the Court

The power to vacate a judgment that has been obtained by fraud upon the court is inherent in courts.⁴⁷ Indeed even the

39. No discretion

In re Miller, D.C.Ill.1967, 262 F.Supp. 295.

40. Soldiers' and Sailors' Act

50 App. U.S.C.A. §§ 501 et seq.

41. Advisory Committee Note

"It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, § 501 et seq., a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court." 5 F.R.D. at 479-480. The Note also appears in the Appendix to the volumes on the Civil Rules.

42. Relief available

Defendant was entitled to the vacation of a judgment entered by confession without the filing of an affidavit under the Soldiers' and Sailors' Civil Relief Act, 50 App. U.S.C.A. § 501 et seq., and without compliance with court rule and because of the assessment of excessive damages and the issu-

ance of attachment on the day judgment was entered in violation of Rule 62. FDIC v. Steinman, D.C.Pa.1944, 53 F.Supp. 644.

43. Plenary action

8 U.S.C.A. § 1451(a).

44. Relief by motion

8 U.S.C.A. § 1451(j).

45. Normally to be preferred

Petition of Devlas, D.C.N.Y.1962, 31 F.R.D. 130.

The Second Circuit indicated guarded approval of this view in *Petition of Campbell*, C.A.2d, 1964, 326 F.2d 101.

46. Independent action

Simons v. U. S., C.A.2d, 1971, 452 F.2d 1110.

47. Inherent power

Universal Oil Products Co. v. Root Ref. Co., 1946, 66 S.Ct. 1176, 1179, 328 U.S. 575, 580, 90 L.Ed. 1447.

Mallonee v. Grow, Alaska 1972, 502 P.2d 432, 436, citing *Barron & Holtzoff* (Wright ed.).

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strong statutory policy of finality of judgments of the Tax Court yields to this inherent power,⁴⁸ on the theory that "a decision produced by fraud on the court is not in essence a decision at all and never becomes final."⁴⁹

Thus the final saving clause of Rule 60(b), added in 1948, provides that the rule does not limit the power of a court to set aside a judgment for fraud upon the court. The Advisory Committee Note to that amendment cited, "as an illustration of this situation,"⁵⁰ *Hazel-Atlas Glass Company v. Hartford Empire Company*.⁵¹

In 1932 the Third Circuit had affirmed a judgment in favor of Hartford and against Hazel for patent infringement. In 1941 Hazel filed a petition in the Third Circuit asking that the judgment be set aside. It established that an attorney for Hartford had written an article extolling the patent as a remarkable advance and had arranged to have the article printed in a trade journal under the name of an ostensibly disinterested expert. Both the Patent Office, in granting the patent, and the Third Circuit, in upholding its validity, had relied in part on the article. The Supreme Court, in an opinion by Justice Black, held that the judgment must be vacated.

Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment

"The spirit of the 'fraud on the court' rule is applicable whenever the integrity of the judicial process or functioning has been undercut—certainly in any instance, of misconduct by a party." *Greater Boston Television Corp. v. FCC*, C.A.1971, 463 F.2d 268, 278, 149 U.S.App.D.C. 322.

A court has the inherent power to inquire into the integrity of its own judgments and to set them aside when fraud or corruption of its officers has been shown. *Chicago Title & Trust Co. v. Fox Theatres Corp.*, D.C.N.Y.1960, 182 F.Supp. 18, 38.

See also

U. S. v. International Tel. & Tel. Corp., D.C.Conn.1972, 349 F.Supp. 22, 28 ("the court can consider this claim [of fraud] without the

intervention of the movants as parties").

48. Tax court

Toscano v. Commissioner of Internal Revenue, C.A.9th, 1971, 441 F.2d 930.

Kenner v. Commissioner of Internal Revenue, C.A.7th, 1968, 387 F.2d 689, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112.

49. Never becomes final

Kenner v. Commissioner of Internal Revenue, C.A.7th, 1968, 387 F.2d 689, 691, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112.

50. Advisory Committee Note

5 F.R.D. at 479.

51. Hazel-Atlas case

1944, 64 S.Ct. 997, 322 U.S. 238, 88 L.Ed. 1250.

obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.⁵²

The Court thought it immaterial that Hazel may not have exercised proper diligence in uncovering the fraud. It first pointed out that the case did not concern only private parties and that there are "issues of great moment to the public in a patent suit."⁵³ It then added:

Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.⁵⁴

The Court also held that it need not decide to what extent the article had impressed the judges who voted to uphold the patent nor was it relevant whether the statements in the article were true. Hartford had thought the article material, they had had it published under a false name, and they could not now dispute its effectiveness.⁵⁵ Since the fraud had been on the Third Circuit that court was the appropriate court to remedy the fraud.⁵⁶ It was directed to vacate its 1932 judgment and to direct the district court to deny all relief to Hartford.⁵⁷

Almost all of the principles that govern a claim of fraud on the court are derivable from the Hazel-Atlas case. The power exists in every court. If the fraud was on an appellate court,

52. Deliberately planned scheme

64 S.Ct. at 1001, 322 U.S. at 245.

53. Issues of great moment

64 S.Ct. at 1001, 322 U.S. at 246.

54. Mute and helpless victims

64 S.Ct. at 1001, 322 U.S. at 246.

55. Not dispute effectiveness

64 S.Ct. at 1001-1002, 322 U.S. at 246-247.

56. Appropriate court

64 S.Ct. at 1002-1003, 322 U.S. at 247-250.

57. Deny all relief

64 S.Ct. at 1003-1004, 322 U.S. at 250-251.

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that court, rather than the trial court, should consider the matter.⁵⁸ Although a party may bring the matter to the attention of the court, this is not essential, and the court may proceed on its own motion.⁵⁹ The fact that there are no adversary parties on the claim of fraud on the court does not deprive the court of jurisdiction. Since the original judgment, by hypothesis, must have been given in a "case or controversy," the court continues to have ancillary jurisdiction to determine whether it has been the victim of a fraud.⁶⁰

There is no time limit on setting aside a judgment on this ground,⁶¹ nor can laches bar consideration of the matter.⁶² It

58. Every court

Hazel-Atlas Glass Co. v. Hartford Empire Co., 1944, 64 S.Ct. 997, 1002-1003, 322 U.S. 238, 247-250, 88 L.Ed. 1250.

Universal Oil Prods. Co. v. Root Ref. Co., 1946, 66 S.Ct. 1176, 328 U.S. 575, 90 L.Ed. 1447.

Root Ref. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1948, 169 F.2d 514, certiorari denied 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

The court that was the victim of the fraud is the only court that can decide the question and it cannot be raised by an independent action in another court. Taft v. Donellan Jerome, Inc., C.A.7th, 1969, 407 F.2d 807.

59. Proceed on own motion

Universal Oil Prods. Co. v. Root Ref. Co., 1946, 66 S.Ct. 1176, 328 U.S. 575, 90 L.Ed. 1447.

Root Ref. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1948, 169 F.2d 514, 521-523, certiorari denied 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444. In this case the court said, at 523, that the facts that had come to its attention "not only justify the inquiry but impose upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, if any should be found to exist."

Defrauded district court may take action sua sponte to expunge a judgment constituting fraud on the

court and anyone, whether his hands are clean or dirty, may suggest that it do so. Martina Theatre Corp. v. Schine Chain Theatres, Inc., C.A.2d, 1960, 278 F.2d 798.

See Kupferman v. Consolidated Research & Mfg. Corp., C.A.2d, 1972, 459 F.2d 1072, 1074 n. 1.

60. Ancillary jurisdiction

Root Ref. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1958, 169 F.2d 514, 521-522, certiorari denied 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

61. No time limit

Serzysko v. Chase Manhattan Bank, C.A.2d, 1972, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139.

Wilkin v. Sunbeam Corp., C.A.10th, 1968, 405 F.2d 165.

Dausuel v. Dausuel, C.A.1952, 195 F.2d 774, 90 U.S.App.D.C. 275.

Mallonee v. Grow, Alaska 1972, 502 P.2d 432, 437, citing Barron & Holtzoff (Wright ed.).

Gifford v. Bowling, 1972, 200 N.W.2d 379, 383, — S.D. —, quoting Barron & Holtzoff (Wright ed.).

"The only instance in which Rule 60(b) allows for the reopening of lawsuits regardless of the passage of time is when there is an allegation of fraud upon the court, for the law favors discovery and cor-

62. See note 62 on page 251.

does not matter whether a party bringing the fraud to the court's attention has clean hands.⁶³

In a case two years after the Hazel-Atlas case the Supreme Court spoke to the procedures that are appropriate in resolving a claim of fraud on the court.

The power to unearth such a fraud is the power to unearth it effectively. Accordingly a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed.⁶⁴

The court, if it sees fit, may avail itself of amici curiae to represent the public interest in the administration of justice and can call on the law officers of the United States to serve in this capacity.⁶⁵

If it is found that there was a fraud on the court, the judgment should be vacated and the guilty party denied all relief.⁶⁶ The entire cost of the proceedings, including attorneys' fees, may be

rection of corruption of the judicial process even more than it requires an end to lawsuits." Lockwood v. Bowles, D.C.D.C.1969, 46 F.R.D. 625, 634.

69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

65. Amici curiae

Universal Oil Prods. Co. v. Root Ref. Co., 1946, 66 S.Ct. 1176, 1179, 328 U.S. 575, 580-581, 90 L.Ed. 1447.

62. Not barred by laches

Hazel-Atlas Glass Co. v. Hartford Empire Co., 1944, 64 S.Ct. 997, 1001, 322 U.S. 238, 246, 88 L.Ed. 1250.

Tosceno v. Commissioner of Internal Revenue, C.A.9th, 1971, 441 F.2d 930, 936-937.

63. Clean hands immaterial

Martina Theatre Corp. v. Schine Chain Theatres, Inc., C.A.2d, 1960, 278 F.2d 798, 801.

64. Adversary proceedings

Universal Oil Prods. Co. v. Root Ref. Co., 1946, 66 S.Ct. 1176, 1179, 328 U.S. 575, 580, 90 L.Ed. 1447 (per Frankfurter, J.).

The careful procedures that were followed on remand are described in Root Ref. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1948, 169 F.2d 514, 518-521, certiorari denied

66. Denied all relief

Hazel-Atlas Glass Co. v. Hartford Empire Co., 1944, 64 S.Ct. 997, 1003-1004, 322 U.S. 238, 250-251, 88 L.Ed. 1250.

"The records of the courts must be purged and the judgments in Universal's favor both in this court and in the District Court, must be vacated and the suits by Universal must be finally dismissed. No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever the merits of his claim." Root Ref. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1948, 169 F.2d 514, 534-535, certiorari denied 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

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assessed against that party.⁶⁷ It is not appropriate, however, to award the fees and costs of amici curiae who already have been compensated by private clients.⁶⁸

Since the power to vacate a judgment for fraud on the court is so great, and so free from procedural limitations, it is important to know what kind of conduct falls into this category. Several definitions have been attempted. A number of courts have accepted the suggestion of a distinguished commentator that "fraud upon the court" is fraud that "does, or attempts to, defile the court itself," or that is "perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication."⁶⁹

The Ninth Circuit has offered a different definition, saying that "to set aside a judgment or order because of fraud upon the court * * * it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision."⁷⁰ Later, however, that same court said that the

67. Cost of proceedings

Universal Oil Prods. Co. v. Root Ref. Co., 1946, 66 S.Ct. 1176, 1179, 328 U.S. 575, 580, 90 L.Ed. 1447.

68. Compensated by private clients

Universal Oil Prods. Co. v. Root Ref. Co., 1946, 66 S.Ct. 1176, 1179, 328 U.S. 575, 581, 90 L.Ed. 1447.

69. Term defined

Serzysko v. Chase Manhattan Bank, C.A.2d, 1972, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139.

Kupferman v. Consolidated Research & Mfg. Corp., C.A.2d, 1972, 459 F.2d 1072, 1078.

Kenner v. Commissioner of Internal Revenue, C.A.7th, 1968, 387 F.2d 689, 691, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112.

Martina Theatre Corp. v. Schine Chain Theatres, Inc., C.A.2d, 1960, 278 F.2d 798, 801.

Lockwood v. Bowles, D.C.D.C.1969, 46 F.R.D. 625, 631.

Mallonee v. Grow, Alaska 1972, 502 P.2d 432, 438.

Gifford v. Bowling, 1972, 200 N.W.2d 379, 384, — S.D. —.

This definition is taken by these courts from 7 Moore, Federal Practice, 2d ed. 1971, ¶ 60.23 at p. 515.

But see

The Ninth Circuit has said that this definition is "not * * * very helpful. What is meant by 'defile the court itself'? What is meant by 'fraud perpetrated by officers of the court'? Does this include attorneys? Does it include the case in which an attorney is deceived by his client, and is thus led to deceive the court? The most that we can get out of Moore's definition is that the phrase 'fraud on the court' should be read narrowly, in the interest of preserving the finality of judgments, which is an important legal and social interest. We agree, but do not find this of much help to us in deciding the question before us." *Toscano v. Commissioner of Internal Revenue*, C.A.9th, 1971, 441 F.2d 930, 933-934.

70. Unconscionable plan or scheme

England v. Doyle, C.A.9th, 1960, 281 F.2d 304, 309.

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distinction between "fraud" and "fraud upon the court" is by no means clear, and most attempts to state it seem to us merely compilations of words that do not clarify."⁷¹

Still more recently a commentator has attempted yet a third formulation, though it may well be that it is subject to the same criticism that the Ninth Circuit directed at its own attempt at definition:

Thus, fraud upon the court embraces a wider scope of fraud than that directed only against public organs of justice; it may in appropriate circumstances extend to a case where injury to the public is primarily and extraordinarily involved. However, there is no reason to believe it includes all forms of fraud.⁷²

Perhaps the principal contribution of all of these attempts to define "fraud upon the court" and to distinguish it from mere "fraud" is as a reminder that there is a distinction. Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense.⁷³ That cannot be the sense in which the term is used in the final saving clause of Rule 60(b). The remedy for most cases of fraud must continue to be by motion under Rule 60(b) (3)⁷⁴ or by an independent action,⁷⁵ subject to the procedural limitations applicable to those remedies. The draftsmen must have conceived of "fraud upon the court," as they used that phrase, as referring to very unusual cases involving "far more than an injury to a single litigant."⁷⁶

Thus the courts have refused to invoke this concept in cases in which the wrong, if wrong there was, was only between the

71. Do not clarify

Toscano v. Commissioner of Internal Revenue, C.A.9th, 1971, 441 F.2d 930, 933.

See also

"The term 'fraud on the court' is a nebulous concept. A clear example is the corruption of judicial officers." Wilkin v. Sunbeam Corp., C.A.10th, 1972, 466 F.2d 714, 717.

72. Third formulation

Comment, Rule 60(b): Survey and Proposal for General Reform, 1972, 60 Calif.L.Rev. 531, 557.

73. Any fraud

Moore & Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 692 n. 266.

Comment, Invalidating a Judgment for Fraud and the Effect of Federal Rule 60(b), 1952, 3 Duke B.J. 41, 42.

74. Motion under Rule 60(b)(3)

See §§ 2860, 2861.

75. Independent action

See § 2868.

76. Injury to a single litigant

Hazel-Atlas Glass Co. v. Hartford Empire Co., 1944, 64 S.Ct. 997, 1001, 322 U.S. 238, 246, 88 L.Ed. 1250.

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parties in the case and involved no direct assault on the integrity of the judicial process.⁷⁷ Nondisclosure by a party or his attorney has not been enough.⁷⁸

77. Wrong between parties

Taxpayer's petition that related a number of incidents in which he felt that agents of the Internal Revenue Service acted improperly or showed animus toward him and that complained about the nature of the representation accorded him and that complained of bias on the part of the judge was insufficient to show that a fraud had been perpetrated on the Tax Court. *Kenner v. Commissioner of Internal Revenue*, C.A.7th, 1968, 387 F.2d 689, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112.

When a consent judgment enjoining an alleged infringer from infringing a patent was entered in a case in which the issue of misrepresentation of the patent holder in obtaining the patent was one of the key issues and was adjusted by the holder and infringer between themselves by negotiating a settlement, the infringer was not entitled to be relieved from the judgment on the ground that it had been obtained by fraud on the court, despite a later commission ruling that the patent had been obtained by misrepresentation. *Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp.*, C.A.2d, 1967, 385 F.2d 533.

There had been no fraud on the court when plaintiff's contention was no more than an attempt to prove that the defendants made misrepresentations to the SEC in obtaining an exemption order, that very issue had been argued before the court, and no claim was made that officers of the court attempted to secure action of the court on the basis of documents known by them to be false. *Hawkins v. Lindsley*, C.A.2d, 1964, 327 F.2d 356.

Dismissal of an action on stipulation of the parties, even though based on an agreement between them that was in violation of an earlier consent decree entered by the

court, was not a fraud upon the court. *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, C.A.2d, 1960, 278 F.2d 798. The court makes the point that the settlement, and dismissal of a private antitrust action by the court, did not impair the court's power to enforce the consent decree.

The refusal to proceed to arbitration by companies that had obtained judgment enjoining action by a reinsured and compelling arbitration was not fraud upon the court sufficient to entitle the reinsured to vacation of a judgment. *American Home Assur. Co. v. American Fidelity*, D.C.N.Y.1966, 261 F.Supp. 734.

See also

Serzysko v. Chase Manhattan Bank, C.A.2d, 1972, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139.

78. Nondisclosure

Since the attorney for a successful plaintiff had made no misrepresentations, it would be going too far to characterize as "fraud upon the court" his failure to disclose an instrument that he could have supposed reasonably, though erroneously, to have been known to his adversary. *Kupferman v. Consolidated Research & Mfg. Corp.*, C.A.2d, 1972, 459 F.2d 1072.

Allegations in plaintiff's petition to set aside the judgment in a patent suit on the ground that certain judges had practiced "low-down common thievery" and had been guilty of "misconduct, dishonest and fraudulent acts and omissions" did not create any duty on the part of defendant in the patent suit to respond, and defendant did not commit fraud on the courts on the theory that it failed to make a complete enough disclosure of its relationship with the judge pre-

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The cases in which it has been found that there was, or might have been, a "fraud upon the court," for the most part, have been cases in which there was "the most egregious conduct involving a corruption of the judicial process itself."⁷⁹ The concept clearly includes bribery of a judge⁸⁰ or the employment of counsel in order to bring an improper influence on the court.⁸¹ The Hazel-Atlas case itself is more difficult to understand. Perhaps the relevant consideration there is that an attorney, an officer of the court, had set out deliberately to mislead the court by having the article published under the name of a supposedly disinterested person who in fact had not written it.⁸²

siding in the patent suit. *Kinnear-Weed Corp. v. Humble Oil Ref. Co.*, C.A.5th, 1971, 441 F.2d 631.

That the state's response to a habeas corpus petition referred to the affidavit of the lawyer representing the accused on his appeal from the state court conviction but the state failed to annex the affidavit to the response or thereafter present it did not amount to such fraud on the court as would justify setting aside an order denying habeas corpus relief, when the statements attributed by the state to the attorney were expressions of opinion on a matter of law and not a purported recitation of facts and were irrelevant and did not affect the district court's determination of the petition for habeas corpus. *Keys v. Dunbar*, C.A.9th, 1969, 405 F.2d 955.

Failure of a United States District Attorney to advise the district court, which had entered a decree of forfeiture of an automobile for violation of the internal revenue laws dealing with distilled spirits of subsequent entry, of a "no bill" by the grand jury as to the automobile owner on charges of violating the internal revenue laws, did not constitute constructive fraud on the court authorizing the vacation of the decree of forfeiture. *U. S. v. One 1940 Oldsmobile Sedan Auto., Motor No. G-96103*, C.C.A.7th, 1948, 167 F.2d 404.

79. Corruption of judicial process

Lockwood v. Bowles, D.C.D.C.1969, 46 F.R.D. 625, 632.

80. Bribery of a judge

Root Ref. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1948, 169 F.2d 514, 525-535, certiorari denied 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

When there were serious charges laid against the integrity of the court and the judge against whom grave charges were made stood convicted of dishonest judicial conduct in another connection and there was evidence lending support to the claim that in a later phase of the case in question the judge who entered the order was corruptly influenced, the court directed that petitioners file with the court a detailed statement of any actual proof that they might have showing that the order in question was brought about by corruption of the judge in question. *Chicago Title & Trust Co. v. Fox Theatres Corp.*, D.C.N.Y.1960, 182 F.Supp. 18.

81. Improper influence

Root Ref. Co. v. Universal Oil Prods. Co., C.C.A.3d, 1948, 169 F.2d 514, 535-541, certiorari denied 69 S.Ct. 481, 335 U.S. 912, 93 L.Ed. 444.

82. Relevant consideration

In *Lockwood v. Bowles*, D.C.D.C. 1969, 46 F.R.D. 625, 632, the Hazel-Atlas case is cited as an illustration of "the involvement of an attorney (an officer of the court) in the perpetration of fraud." In *Lockwood* the court also cited for the same proposition *Sutter v. Easterly*, 1945, 189 S.W.2d 284, 354 Mo. 282. In that case the state court, relying on the Hazel-Atlas

Cases of perjured evidence are troublesome. There are a few cases in which the courts have said that this was a fraud upon the court, even in the absence of any suggestion that any officer of the court was a party to the perjury.⁸³ Distinctions can be drawn between the false name on the article in *Hazel-Atlas* and false testimony in the courtroom but they are not easy nor particularly persuasive. But there is a powerful distinction between perjury to which an attorney is a party and that with which no attorney is involved.⁸⁴ If that is a correct understanding of *Hazel-Atlas*, whether perjury constitutes a fraud on the court should depend on whether an attorney or other officer of the court was a party to it.⁸⁵ In a thoughtful opinion, a district court has recently accepted this analysis of the perjury cases, saying:

we believe the better view to be that where the court or its officers are not involved, there is no fraud upon the court

decision, held that it is a fraud upon the court for a lawyer to engage in a conspiracy to produce fabricated evidence.

The American Law Institute read *Hazel-Atlas* and *Sutterly* as teaching that perjured testimony or the production of false documents will require vacating a judgment "if the perjured testimony or false statement had been knowingly procured by the successful party or his attorney." Restatement, Judgments, Supp.1948, § 126, comment c. This may go beyond the cases insofar as it extends to "the successful party." Comment, Rule 60(b): Survey and Proposal for General Reform, 1972, 60 Calif.L.Rev. 531, 555 n. 168.

See also

An attorney's loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court, and, when he departs from that standard, he perpetrates a "fraud upon the court" within the savings clause of the rule governing relief from judgment or order. *Kupferman v. Consolidated Research and Mfg. Corp.*, C.A.2d, 1972, 459 F.2d 1072. The facts of this case are described in note 78 above. It was found that there had not been a "fraud upon the court."

83. Relief for perjury

Lim Kwock Soon v. Brownell, C.A. 5th, 1966, 369 F.2d 808. The opinion is quite uninformative about what was quite a colorful case. See the earlier opinions in the case, D.C.Tex.1956, 143 F.Supp. 388, reversed C.A.5th, 1958, 253 F.2d 809; D.C.Tex.1966, 253 F.Supp. 963; and Note, Federal Rules 52(a) and 60 (b)—A Chinese Puzzle, 1967, 21 Sw.L.J. 339.

Dausuel v. Dausuel, C.A.1952, 195 F.2d 774, 90 U.S.App.D.C. 275.

84. Powerful distinction

See note 82 above.

85. Whether attorney a party

On the analysis suggested in the text, *Toscano v. Commissioner of Internal Revenue*, C.A.9th, 1971, 441 F.2d 930, was correctly decided. In that case it was found that there had been a fraud on the Tax Court by a taxpayer who filed joint returns, signing the name of a woman who was not his wife, and as a result the Tax Court gave judgment against both him and the woman. But in that case there was the further element that "Miss Zelasko claims that the fraud was carried forward by Toscano's having his attorney stipulate to joint deficiencies, on the basis of which the decision was entered. She dis-

within the meaning of Rule 60(b). The possibility of a witness testifying falsely is always a risk in our judicial process, but there are safeguards within the system to guard against such risks.⁸⁶

E. APPELLATE REVIEW

§ 2871. Availability of Review

The correction of clerical errors poses no problems with regard to appeal. The application for the correction does not extend the time for taking the appeal.⁸⁷ Clerical errors may be corrected during the pendency of an appeal or even treated by the appellate court as if they had been corrected.⁸⁸ If the court corrects the judgment—or refuses to correct it—after an appeal has ended or after the time for appeal has run in a case in which no appeal was taken, its action would itself be appealable though the appeal would be limited to its disposition of the Rule 60(a) motion and would not bring up for review the underlying judgment.⁸⁹

An application for relief from a judgment under Rule 60(b) also does not extend the time for taking an appeal. Even if the court hears and denies the motion before the appeal time would have run, the appeal must be taken with the prior period meas-

claims retaining the attorney or authorizing him to stipulate in her behalf. If she can prove these claims, she has never had her day in court." 441 F.2d at 936.

In *Serzysko v. Chase Manhattan Bank*, C.A.2d, 1972, 461 F.2d 699, 702, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139, perjury by trial witnesses was characterized as intrinsic fraud and not a basis for an independent action. The court also noted that there was no basis for concluding that appellee's attorneys were involved.

86. Analysis accepted

Lockwood v. Bowles, D.C.D.C.1969, 46 F.R.D. 625, 632-633 (per Robinson, J.).

87. Clerical error

U. S. v. 1,431.80 Acres of Land, More or Less, in Cross County, Arkansas, C.A.8th, 1972, 466 F.2d 820.

Motion to correct a clerical mistake in the entry of judgments did not affect the finality of the judgment or suspend the running of the time for filing the notice of appeal. *Albers v. Gant*, C.A.5th, 1970, 435 F.2d 146.

88. Corrected during appeal

See § 2856.

Amendment of a judgment by consent to correct mutually acknowledged errors does not destroy the appealability of the judgment on the ground that it has become a consent judgment. *U. S. v. Cushman*, C.C.A.9th, 1942, 131 F.2d 1021.

89. After appeal

E. g., *Dow v. Baird*, C.A.10th, 1968, 389 F.2d 882.

Home Indem. Co. of New York v. O'Brien, C.C.A.6th, 1940, 112 F.2d 387.